

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-2509

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 74-2509

rec. 4-2-75

DAVID ARBEITMAN,  
Petitioner-Appellant

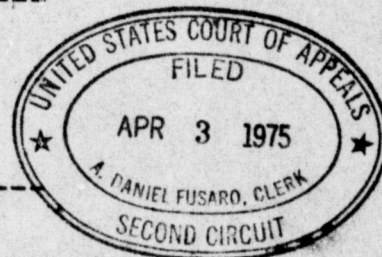
v.

DISTRICT COURT OF VERMONT,  
UNIT NO. 5, WASHINGTON CIRCUIT:  
HON. JOHN P. CONNARN, PRESIDING JUDGE,  
Appellees

B  
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLEE



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## ARGUMENT I

THE INCIDENTAL RESTRICTION OF THE APPELLANT'S FIRST AND FOURTEENTH AMENDMENT FREEDOMS WAS NO GREATER THAN WAS ESSENTIAL TO THE FURTHERING OF AN IMPORTANT AND SUBSTANTIAL GOVERNMENT INTEREST.

The statute in question 13 V.S.A. §1026(5) reads in part as follows:

A person who, with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof:

(5) Obstructs vehicular or pedestrian traffic, shall be imprisoned for not more than 60 days or fined not more than \$500.00 or both.

In considering the Appellant's contention that the above statute is vague and overbroad it is incumbent and necessary to closely examine his conduct and activities as they relate to the statute in question.

In the third paragraph of the Appellant's Petition for a Writ of Habeas Corpus, he admits sitting down in front of one of the two doors leading into the building in question. What is even more damaging to the Appellant is his testimony in the trial before the Vermont District Court which is set forth on page 12 of the Appellant's Brief, the pertinent portion which is as follows:

- Q. Did you intend to sit down where you did in front of that door?
- A. Just before I did it, yes.
- Q. Did you understand that the consequence of that act would mean you would have to be forcefully pushed out of the way?
- A. I didn't really know what was going to happen.
- Q. After the first time this occurred, did you realize this would have to occur in the future?

A. I realized if anybody else had to get in they would probably shove me aside as they did the first time.

Q. They would have to - isn't that correct?

A. Yes.

Q. After the first time you were pushed aside, didn't you intend remaining sitting there; that anyone else would have to push you aside?

A. That wasn't my intention. My intention was to make a symbolic gesture.  
(T. 82)

From the above it is clear that not only did the Appellant intend to sit down in front of the door, but he realized that if anyone else was to get through the door they would have to physically push him aside, which was done on more than one occasion. In fact, the Appellant remained in front of the door after being forceably shoved or pushed aside earlier.

The case of United States v. Jones, 365 F.2d 675, which is cited in the Appellant's Brief, involved a factual situation where several persons chained themselves to the front windows and doors of the entrance to the United States Court House in New York. There were several other entrances to the Court House, so complete access was not denied.

The statute in question, §722(2) of the New York Penal Code provides in relevant part as follows:

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: \* \* \*

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others: \* \* \*.

The Second Circuit examined other New York decisions interpreting this statute and concluded that the statute was not overbroad. In the Jones case, supra, the Court held as follows:

By direct contrast, there is no reason to believe that §722(2) as construed by the highest Court of New York State would "allow persons to be punished merely for peaceably expressing unpopular views." (Idem 678)

The Plaintiff attempts to avoid the ruling in this case by arguing that the New York Court of Appeals has narrowly construed the statute. However, the physical circumstances of the situations narrowly construed must be examined in detail.

One of the cases considered by the Court of Appeals was that of People v. Carcel, 3 N.Y.2d 327, 165 N.Y.S.2d 113, 144 N.E.2d 81. In this case a conviction was reversed where the participants were engaged in peaceful picketing along with distributing leaflets which did not constitute disorderly conduct. The Court stated that something more than a mere inconveniencing of pedestrians is required to support a conviction under the statute.

In the case of People v. Nixon, 248 N.Y. 182, 161 N.E. 463, twenty defendants were parading on a New York City street four abreast on a sidewalk only 12 feet wide. There the Court held that the evidence was insufficient to warrant a conviction under the New York statute dealing with obstructing streets. In that case the Court remarked that "no circumstances have been shown which would give the color of disorder and violence to conduct which is otherwise colorless."

The Appellant places great reliance on the case of Cox v. Louisiana, 379 U.S. 536, to support his proposition that the Vermont statute permits a conviction for the mere expression of unpopular views.

The relevant portion of the Louisiana statute under which Cox was convicted provided in part as follows:

Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on . . . when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person . . . shall be guilty of disturbing the peace.  
La. Rev. Stat. §14:103.1 (Cum. Supp. 1962).

The Court held that this statute would allow people to be punished merely for peacefully expressing unpopular views. The evidence was that the demonstration itself was peaceful, that traffic was not obstructed and local law enforcement officials reacted with force to a speech being given to a group of demonstrators.

The Louisiana statute is a far cry from the Vermont statute which does not punish for spewing words, so to speak, but for intentionally obstructing vehicular or pedestrian traffic.

Of particular significance, in the Cox case, supra, was that the Court actually commented on the very conduct the Appellant was engaged in, when it made the following observation:

A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.  
(Idem 555).

## ARGUMENT II

THE VERMONT SUPREME COURT'S DECISION CONSTITUTED A STATURORY INTERPRETATION AND NOT A NARROWING OF AN OVERBROAD STATUTE.

The Appellant contends that the construction placed on this statute by the Supreme Court retroactively deprives anyone arrested previously of a fair warning of the prohibited conduct. He relies on the case of Bouie v. City of Columbia, 378 U.S. 347, 85 S. Ct. 1697 to support his contention. However, the Bouie case, is not controlling for two reasons. First, the Vermont Supreme Court's action really amounted to a statutory interpretation and not a narrowing of an overbroad statute. Secondly, the Bouie case applies only to situations involving the judicial expansion of statutes and the clarification of vague statutes.

That Bouie does not apply to the narrowing of overbroad statutes is made clear by the Supreme Court's opinion in Colton v. Kentucky, 407 U.S. 104, in which the Court let stand the application of a judicially narrowed statute to a defendant in the same case in which the state court developed its interpretation. The Supreme Court made no mention of Bouie.

The Appellant cites the case of Smith v. Goguen, 94 S. Ct. 1242 (1974) where the defendant was convicted of violating a Massachusetts statute which read in part as follows:

Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts . . . shall be punished by a fine of not less than \$10 or more than \$100 or by imprisonment for not more than one year, or both.

The Complaint as sworn out by the arresting officer did not charge the defendant with any act of physical desecration of the flag but merely charged him with publically treating contemptuously the flag of the United States.

The Supreme Court held that the portion of the statute under which the defendant was charged and eventually convicted is void for vagueness under the due process clause of the Fourteenth Amendment, since by failing to draw reasonably clear lines between the kinds of non-ceremonial treatment of the flag that are criminal and those that are not, the statute does not provide adequate warning of forbidden conduct and sets forth a standard so indefinite that police, court and jury are free to react to nothing more than their own preferences for treatment of the flag.

The statute in question here is entirely different from the Vermont statute, which the Appellant was charged and convicted under. The Vermont statute is far more definite, has prescribed specific conduct, that is, the obstruction of vehicular or pedestrian traffic.

In Colton v. Kentucky, the Appellant was convicted of violating a Kentucky statute which read in part as follows:

(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly create a risk thereof, he:

(f) congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse. . . .

The Kentucky Court of Appeals in interpreting the above statute held that it does not prohibit the lawful exercise of any constitutional right. The Court held that the plain meaning of the statute required that the proscribed conduct be done with intent to cause public inconvenience, annoyance or alarm, or recklessly create a risk thereof. The Court concluded that the Appellant was not undertaking the exercise of any constitutionally protected freedom at the time of his arrest.

The factual situation in the Colton case, supra, did not involve a physical obstruction to vehicular or pedestrian traffic, but the Appellant was apprehended and arrested when he allegedly interfered with a police officer who was issuing a traffic summons to a friend of the Appellant.

The United States Supreme Court in construing the Kentucky statute made the following observation:

Individuals may not be convicted under the Kentucky statute merely for expressing unpopular or annoying ideas. The statutes come into operation only when the individual's interest and expression, judged in the light of all relevant factors, is minuscule compared to a particular public interest in preventing that expression or conduct at that time and place. (Idem III)

In the case of Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L.Ed. 222, the defendant was convicted for his part in a demonstration in front of a high school in Rockford, Illinois. The Court held that the city antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in

session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school system is not unconstitutionally vague or overbroad.

The Court in considering the claim of overbreath made the following observation:

The nature of a place, the pattern of its normal activities, dictate the kinds or regulations of time, place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.  
(Idem 117)

It is noteworthy that the activity which the respondent was charged with in the Grayned v. City of Rockford case, supra, did not involve a physical obstruction to vehicular or pedestrian traffic. The United States Supreme Court's justification for upholding the conviction in the above case is based upon a factual situation far less persuasive than is present in the instant case.

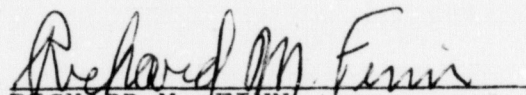
CONCLUSION

For the above reasons, the Appellee respectfully requests that the Opinion and Order of the Honorable Albert W. Coffrin, dated October 7, 1974, be affirmed.

Respectfully submitted this 22~~nd~~ day of March, 1975.

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